A

GOON CHOY FOOK

v.

LAI POH SEE

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COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MOHAMED APANDI ALI JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02(NCVC)-1611-2011]

C

7 JUNE 2012

LAND LAW: *Transfer - Validity - Allegation of fraud - Whether proven - Whether respondent consented to transfer*

D

TORT: *Fraud - Transfer of property - Whether transfer tainted with fraud - Whether fraud proven - Whether respondent consented to transfer - Whether appellant entitled to vacant possession*

The plaintiff/respondent's action here was for a declaration that she was the rightful owner of a piece of land ('the property'), and
E further, for the sale and purchase agreement ('S&P agreement') in respect of the property and the transfer thereof to the appellant/ defendant to be declared null and void and of no effect. The facts showed that the plaintiff had purchased the property on 28 June 1999. Although the plaintiff was the purchaser, payment
F for the property was however paid and settled by a gentleman known to the plaintiff as "Hubby". The plaintiff was not married to Hubby and was oblivious of his true name, but for all intents and purposes considered Hubby as her husband. Be that as it may, on 11 November 2005, Hubby sold the property to the
G defendant and had the plaintiff execute the S&P agreement and the relevant memorandum of transfer ('MOT'). The plaintiff however subsequently alleged the sale transaction was tainted with fraud and misrepresentation, and on that score applied for the above declarations. The defendant, on the other hand, counter-
H claimed for vacant possession and rentals of the property. The learned Judicial Commissioner ('JC') held that the S&P agreement and the MOT were valid, and not tainted with fraud, and in the circumstances allowed the defendant's counter-claim for vacant possession. The JC however allowed the plaintiff's claims for
I damages and dismissed the defendant's claim for rentals. Dissatisfied with the decision, both parties appealed and cross-appealed.

Held (dismissing plaintiff's claim and setting aside award for damages; upholding JC's decision on refusal of rentals)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) Based on both oral and documentary evidence, there was not an iota of evidence to show any taint of fraud or fraudulent misrepresentation by the defendant in the execution of the documents pertaining to the sale and transfer of the property. Hence, the learned trial judge had not erred in dismissing the plaintiff's claims. The trial judge had also correctly allowed the defendant's counter-claim for delivery of vacant possession of the property. (para 12)

(2) The plaintiff's claims for special damages must be proven. On the facts, there was no evidence on the special damages suffered by the plaintiff. (para 14)

(3) Damages as claimed by the plaintiff were premised upon the main cause of action of fraud. Once the court was not with the plaintiff on the tort of fraud, there could no longer be any basis for the award of damages to stand on and therefore, the substratum of the claim did not anymore exist. (paras 14 & 15)

(4) The defendant's counter-claim for rentals must stand dismissed since all dealings in connection with the sale and rental of the said property were strictly between the defendant and Hubby. It was obvious that only Hubby could throw some light on the issue of rentals. The failure to call Hubby as a witness was fatal, resulting in the invocation of adverse inference under s. 114(g) of the Evidence Act 1950 against the defendant. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Tindakan plaintif/responden di sini adalah untuk deklarasi bahawa beliau adalah pemilik sah sebidang hartanah ('hartanah tersebut') dan supaya perjanjian jual beli mengenai tanah tersebut ('perjanjian S&P') dan pindahmiliknya kepada defendan/perayu diisytihar sebagai batal, tidak sah dan tidak berkuatkuasa. Fakta menunjukkan bahawa plaintif membeli hartanah tersebut pada 28 Jun 1999. Walaupun plaintif adalah pembeli, pembayaran bagi hartanah tersebut telah dijelaskan oleh seorang lelaki yang dipanggil

A plaintiff sebagai "Hubby". Plaintif tidak berkahwin dengan Hubby dan tidak mengetahui nama sebenarnya, tetapi untuk semua maksud menganggapnya sebagai suaminya. Apapun, pada 11 November 2005, Hubby menjual hartanah tersebut kepada defendan dan berikutnya plaintif telah menandatangani perjanjian
B S&P serta memorandum pindahmilik yang berkaitannya ('MOT'). Plaintif bagaimanapun kemudian mendakwa bahawa transaksi jual beli telah dikotori oleh fraud dan salahnyata, dan atas alasan itu telah memohon relif-relif di atas. Defendan sebaliknya, menuntut balas untuk pengosongan dan sewa hartanah tersebut. Yang arif
C Pesuruhjaya Kehakiman ('PK') memutuskan bahawa Perjanjian S&P dan MOT adalah sah, dan tidak dikotori oleh fraud, dan dengan itu membenarkan tuntutan defendan untuk pengosongan hartanah. Namun begitu, PK telah membenarkan tuntutan plaintif untuk gantirugi dan menolak tuntutan balas defendan untuk caj sewaan.
D Tidak berpuashati dengan keputusan, kedua-dua pihak merayu dan merayu-balas.

Diputuskan (menolak awad gantirugi kepada plaintif; mempertahankan keputusan PK berkaitan penolakan sewa)
E **Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:**

(1) Berdasarkan kepada keterangan lisan dan dokumentar, tiada keterangan yang menunjukkan apa-apa fraud atau salah nyata oleh defendan dalam pemeteraian dokumen-dokumen berkaitan
F dengan penjualan dan pindahmilik tanah tersebut. Oleh itu, yang arif hakim bicara tidak khilaf apabila menolak tuntutan plaintif. Hakim bicara juga betul dalam membenarkan tuntutan balas defendan untuk milikan kosong hartanah tersebut.

G **(2)** Tuntutan plaintif untuk gantirugi khas harus dibuktikan. Berdasarkan fakta-fakta, tidak terdapat bukti untuk gantirugi khas yang ditanggung oleh plaintif.

(3) Gantirugi yang dituntut oleh plaintif adalah berdasarkan fraud
H sebagai kausa tindakan utama. Sebaik sahaja mahkamah tidak bersetuju dengan plaintif tentang tort berkenaan fraud, tiada lagi sebarang asas bagi awad gantirugi dan oleh itu, substratum tuntutan itu tidak wujud lagi.

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(4) Tuntutan balas defendan untuk sewa harus ditolak memandangkan semua rundingan berkenaan penjualan dan sewaan tanah tersebut adalah di antara defendan dan Hubby. Hanya Hubby yang boleh menjelaskan tentang isu sewa. Oleh itu, kegagalan memanggil Hubby sebagai saksi adalah fatal, sekaligus menyebabkan penimbulan inferens bertentangan di bawah s. 114(g) Akta Keterangan 1950 terhadap defendan.

Case(s) referred to:

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Datuk Jaginder Singh & Ors v. Tara Rajaratham [1983] 1 LNS 21 FC ***(refd)***

Loke Yew v. Port Swettenham Rubber Co Ltd [1913] AC 491 ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***

Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd [1987] 1 LNS 79 HC ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(1)

Evidence Act 1950, ss. 101, 114(g)

For the appellant - Low Eu Thuan; M/s Cheong Wai Meng & Van Buerle
For the respondent - KK Loong; M/s Wong & Chua

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-22NCVC-16-2010]

Reported by Wan Sharif Ahmad & Baizura Abd Razak

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] This is an appeal by the appellant and cross-appeal by the respondent against parts of the decision of the High Court where part of the counter-claim by the appellant was dismissed. Both parties were dissatisfied with the decisions of the learned trial judge. The decisions were made after a full trial. For ease of reference we shall refer the parties as they were at the trial below, ie, as the plaintiff and defendant, respectively.

A **Background Facts**

[2] The plaintiff's action is basically for a declaration that the plaintiff is the rightful owner of a piece of land held under Pajakan Negeri No. Pendaftaran 3992, No. Lot 99753, Mukim Hulu
B Kinta, Daerah Kinta, Negeri Perak Darul Ridzuan together with a double storey semi-detached house erected thereon having the postal address of No. 2, Solok Bekor 2, Taman Buluh Emas, 30100 Ipoh, Perak Darul Ridzuan (hereinafter referred to as "the said property"). The plaintiff also seek declaratory orders that a
C sale and purchase agreement dated 11 November 2005 of the said property and the transfer of the said property be declared null and void and of no effect. Consequential to the declarations sought, the plaintiff claimed for special and general damages and aggravated damages.

D **[3]** From the pleadings in the statement of claim, the plaintiff's action is premised on the tort of fraud and/or misrepresentation and/or forgery. These can be seen in paras. 49 and 50 of the plaintiff's statement of claim.

E **[4]** The defendant's counter-claim is for rentals of the said property and premised on breach of contract, namely of cl. 10 in the sale and purchase agreement dated 11 November 2005 between the plaintiff and the defendant.

F **[5]** Briefly the factual matrixes of the case are as follows:

(i) It is not in dispute that the said property was purchased by the plaintiff from a developer as signified by a sale and purchase agreement dated 28 June 1999 and the purchase was financed by a housing loan from RHB Bank.
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(ii) It is also not in dispute that a gentleman known and referred to as "Hubby" paid for the said property. This Hubby had a rather bizarre relationship with the plaintiff. The plaintiff considers Hubby to be her husband, although not married to
H him and more perplexing, the plaintiff does not even know the name of this Hubby. The plaintiff had a child with Hubby but the man's name was not recorded in the birth certificate of the child. This Hubby character is a close friend of the defendant. The defendant disclosed that Hubby is one Yeoh
I Kok Wah @ Yong Ah Ku.

(iii) Since Hubby purchased the said property for the plaintiff and paid for it, in law Hubby is the beneficial owner of the said property.

(iv) Sometime on or about 11 November 2005 Hubby sold the said property to the defendant and on the request of Hubby the plaintiff executed a sale and purchased agreement together with the memorandum of transfer.

(v) The said property was duly registered in the name of the defendant on 30 December 2009.

[6] The plaintiff filed the writ of summons in this action in the Kuala Lumpur High Court on 6 October 2010 claiming for declaratory orders pertaining to the sale and purchase agreement dated 11 November 2005 and the registration and title of the said property; and consequential to that also claims for damages.

Findings And Decision Of The High Court

[7] After a full trial, the learned Judicial Commissioner made the following findings:

(a) That the signing of the sale and purchase agreement with the defendant and the memorandum of transfer in favour of the defendant by the plaintiff were not tainted with fraud. This is so because:

(i) the plaintiff did not seriously challenge her signatures on the documents;

(ii) the plaintiff was prepared to live with Hubby and was prepared to accept not knowing his identity and left the affairs of the said property to Hubby;

(iii) the plaintiff went with Hubby to the legal office of DW3, Kiew Lai Wah, an advocate and solicitor from M/s Krish & Kiew and signed the documents pertaining to the sale and transfer of the said property; and

(iv) the documents were signed by the plaintiff in the presence of DW3, who then attested them.

(b) That from the conduct of the plaintiff in signing the documents pertaining to the said property was at the behest and request of Hubby, the plaintiff is estopped from raising the issue of fraud;

A (c) That since Hubby had played a pivotal role in the entire transaction, the failure by the plaintiff to call Hubby as a witness has triggered the adverse inference against her, under s. 114(g) of the Evidence Act 1950.

B **[8]** In conclusion, the learned Judicial Commissioner wrote in his grounds of judgment as follows:

> ... I find as a fact the Plaintiff consented and willingly adhered to whatever Hubby said and the Plaintiff's own evidence bears that out.
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> For all the above reasons I found the transfer of the said property by the Plaintiff to the Defendant to be valid and the court dismissed the Plaintiff's claim in the main.

[9] However on the plaintiff's claims for damages, the learned D Judicial Commissioner allowed the claim and gave a one paragraph reasoning for doing so. The reasoning reads as follows:

> The court found the Defendant was well aware of the position of the Plaintiff and that the Plaintiff occupied the said property and
E whilst the court may have negated a finding of fraud, the Plaintiff has been left high and dry by Hubby and for these reasons I made orders for assessment of damages that the Plaintiff may have suffered before delivery up of vacant possession.

[10] The learned Judicial Commissioner allowed the defendant's F counter-claim in respect of delivery of vacant possession of the said property by the plaintiff but stayed the delivery until completion of the assessment of the damages awarded to the plaintiff. The defendant's other counter-claim for rentals of the said property was dismissed. The reason given by the learned Judicial G Commissioner in dismissing the claim for rentals is a one-liner, which reads as follows:

> 799. The court also dismissed the Defendant's counter claim with costs as the issue of rentals could only have been corroborated by Hubby who was not subpoenaed to testify.

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Finding By This Court

[11] As the plaintiff's case is premised on the tort of fraud and or fraudulent misrepresentation we approach the appeal on the I basis of such pleadings. Foremost in our mind, the legal positions of such pleading are to be appraised on the following guidelines:

(a) That the standard of proof for fraud is one of beyond reasonable doubt. This is trite law, as held by the Federal Court cases of:

Saminathan v. Pappa [1980] 1 LNS 174;

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229,

and by Supreme Court in *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134.

(b) That the issue of fraud is a question of fact. (See: *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55.)

(c) That fraudulent misrepresentation is a species of fraud and such an issue is also a question of fact.

(See: *Loke Yew v. Port Swettenham Rubber Co Ltd* [1913] AC 491; and

Datuk Jaginder Singh & Ors v. Tara Rajaratham [1983] 1 LNS 21.)

[12] From the evidence adduced at the trial, both oral and documentary, it is clear that there is not an iota of evidence to show any taint of fraud or fraudulent misrepresentation by the defendant in the execution of the documents pertaining to the sale and transfer of the said property. On the other hand, there are evidence in rebuttal of the plaintiff's pleadings. It is our judgment that the learned trial judge has not erred in his findings on the issue of fraud and in deciding to dismiss the plaintiff's main claim, namely the declaratory orders sought. Corollary to such findings and decision, it is also our judgment that based on the same facts and evidence, the learned trial judge had correctly allowed the main prayer in the defendant's counter-claim, namely for the delivery of vacant possession of the said property to the defendant, by the plaintiff.

[13] However on the award of damages to the plaintiff, with respect, we could not agree with the learned Judicial Commissioner. The learned Judicial Commissioner's reason for awarding damages for the plaintiff because "... the plaintiff has been left high and dry by Hubby and for these reasons I made orders for assessment of damages that the plaintiff may have suffered before delivery up of vacant possession".

[14] It is our considered view that the learned Judicial Commissioner erred in allowing the claim for damages by the plaintiff. Our reasons are:

(a) Upon perusal of the statement of claim it is, clear that the plaintiff is claiming three different types of damages, namely special and general damages, exemplary damages and aggravated damages. In his decision, the learned Judicial Commissioner granted two types of damages ie, special damages and general damages and that both damages are to be assessed by court. Special damages have to be proved. There is no evidence on the special damages suffered by the plaintiff.

(b) In his grounds of judgment the learned Judicial Commissioner used the words "may have suffered". This is not only highly speculative but also not supported by any evidence.

(c) It is trite law that the burden of proving damages is always on the claimant (See: *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd* [1987] 1 LNS 79; *Popular Industries Ltd v. The Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635. It is also in line with the provisions of s. 101 of the Evidence Act 1950.

(d) Upon a closer scrutiny of the pleadings, it is clear that whatever damages that the plaintiff is claiming is premised upon the main cause of action of fraud. The claim for damages is consequential to the alleged tort by the defendant. This can be seen by the wordings in para. 54 of the statement of claim, which reads:

> Akibat daripada tindakan-tindakan Defendan seperti yang dinyatakan di atas, Plaintif telah mengalami kerugian-kerugian khas ("special damages") dan kerugian-kerugian am ("general damages").

[15] Wherefore, it is our judgment that once the court is not with the plaintiff on the tort of fraud, there can no longer be any basis for the award of damages to stand on. The substratum of the claim does not exist anymore.

[16] On the dismissal of the counter-claim by the defendant for the rentals of the said premises, it is our judgment that it is a decision based on findings of facts. That finding of fact is supported by evidence adduced at the trial. We find no reason to disturb such findings by the learned Judicial Commissioner.

[17] Eventhough the learned Judicial Commissioner gave only a one-liner reason in dismissing the defendant's counter-claim, we agree with his reasoning. Acting on the empowering provisions of s. 69(1) of the Courts of Judicature Act 1964, namely treating this appeal as a re-hearing, we find that there are ample evidence to justify the decision to dismiss the defendant's counter-claim for rentals. The evidence are:

(a) It is in the defendant's own witness statement that all dealings in connection with the said property were in the hands of the Hubby. This includes the reason as to why cl. 10 of the sale and purchase agreement between the plaintiff and the defendant was included. The relevant parts of the defendant's witness statement reads as follows:

> 10. Q: Were there any other terms discussed with Mah?
>
> A: Yes, Yeoh told me that he might want to buy back the property in about 5 years time and suggested that in the event vacant possession cannot be delivered then monthly rental should be paid to me. He explained that he wants to buy another property for Lai who according to Yeoh is occupying the said property.
>
> 11. Q: Was there any discussion on the amount of rental to be paid?
>
> A: Yes, Yeoh proposed the following rental to be paid to me if vacant possession cannot be given after the balance purchase price is paid:
>
> (a) Monthly rental to be RM900,00 for the first and 2nd year
>
> (b) Monthly rental to be RM1,000,00 for the 3rd and 4th year and
>
> (c) Monthly rental to be RM1,200,00 for the 5th and 6th year.

A (b) There is then the evidence of a returned cheque for a sum of RM5,400 issued by the plaintiff in favour of the defendant that was supposed to be for the advanced six months rental of the said property. From evidence adduced by the defendant himself, it is clear that the arrangement for the payment of
B rentals was strictly between the defendant and Hubby (Yeoh). The relevant part of the defendant's witness statement, that reflects such arrangement, reads as follows:

29. Q: What did you do after the cheque was returned?

C A: I spoke to Yeoh about the cheque returned and he told me he will get Lai Poh See to replace a cheque.

30. Q: Did you get a replacement cheque from Lai Poh See?

A: No. Between 2006 until middle of 2008 I often
D chased Yeoh for the replacement cheque.

(c) Since all dealings in connection with the sale and rental of the said property were strictly between the defendant and Hubby, it is obvious that only Hubby can throw some light on the
E issue of rentals. Thus the failure to call Hubby as a witness is fatal, resulting in the invocation of adverse inference under s. 114(g) of the Evidence Act 1950.

Decision And Conclusion

F **[18]** For the above reasons, we unanimously:

(i) held that there was no justification to award damages to the plaintiff and accordingly allowed the defendant's appeal in part; and set aside the said award;

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(ii) held that there were no merit in the defendant's cross-appeal for the rentals of the said property and uphold the High Court decision on that part of the judgment.

[19] In the circumstances of our decision, we are also unanimous
H that it is fair and reasonable, in exercising our discretion not to make any order as to costs. The deposits for the appeal and cross-appeal are to be refunded, respectively.

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